

Chapman Client Alert

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Current Issues Relevant to Our Clients

SEC Adopts Rules to Allow Electronic Signatures for Authentication Documents

On November 17, 2020, the Securities and Exchange Commission (the “SEC”) adopted amendments to Rule 302(b) of Regulation S-T, which will provide more flexibility in connection with SEC filings by allowing the use of electronic signatures in authentication documents. The SEC also adopted corresponding revisions to several rules and forms under the Securities Act of 1933 (“*Securities Act*”), Securities Exchange Act of 1934 (“*Exchange Act*”) and the Investment Company Act of 1940 (“*Investment Company Act*”) to expand the use of electronic signatures.

The text of the SEC’s rule amendments is available [here](#). The following is a summary of the final rule amendments.

Background of Rule 302(b)

Regulation S-T, in conjunction with the EDGAR Filer Manual and other applicable rules and regulations, governs the electronic submission of documents filed with the SEC through EDGAR. Rule 302(b) currently provides that each signatory to an electronic filing must manually sign a signature page or similar document (an “*authentication document*”) before or at the time of the electronic filing in order to authenticate, acknowledge or otherwise adopt the signature that appears in typed form within the electronic filing. Such document must then be retained by the filer for a period of five years and, upon request by the SEC, the filer must furnish a copy of the document with a “wet” signature.

The SEC has stated that the authentication document requirement in Rule 302(b) “was established to provide a satisfactory means by which signatories could authenticate and adopt their typed signatures appearing on filed documents for evidentiary purposes.” However, in March 2020, the SEC provided its views on complying with Rule 302(b) given the public health and safety concerns related to COVID-19. The SEC stated it would not recommend enforcement action with respect to the requirements of Rule 302(b) if:

- a signatory retains an authentication document and provides such document, as promptly as reasonably practicable, to the filer for retention in the ordinary course pursuant to Rule 302(b);
- such document indicates the date and time when the signature was executed; and
- the filer establishes and maintains policies and procedures governing this process.

In April 2020, the SEC received a rulemaking petition requesting the use of electronic signatures when executing authentication documents under Rule 302(b). The rulemaking petition stated that “the current COVID-19 situation has . . . significantly increased the difficulties associated with obtaining manual ‘wet’ signatures” and that “[i]mprovements in electronic signature software technology make it possible to confirm (with at least equal confidence to the collection of manual signatures) who has signed a document and when it was signed.” In June 2020, nearly 100 public companies jointly submitted a letter in support of the rulemaking petition.

After recognizing the widespread use of electronic signatures, technological developments in the security and authentication of electronic signatures and the need to continually support remote workforces, the SEC reevaluated the manual signature requirement of Rule 302(b).

Rule 302(b) Amendments

The new rule amendments permit a signatory to an electronic filing who follows certain procedures to sign an authentication document through an electronic signature. The SEC set forth the new electronic signature requirements in the EDGAR Filer Manual. When a signatory signs an authentication document using an electronic signature, the signing process for the electronic signature must, at a minimum:

1. Require the signatory to present a physical, logical or digital credential that authenticates the signatory’s individual identity;¹
2. Reasonably provide for non-repudiation of the signature;²

3. Provide that the signature be attached, affixed or otherwise logically associated with the signature page or document being signed; and
4. Include a timestamp to record the date and time of the signature.

In addition to incorporating a security measure for authentication and non-repudiation, the signing process requirements also provide that the signature be logically associated with the signature page or document being signed. This will provide the signatory with notice of the nature and substance of the document and an opportunity to review it before signing. The electronic signature must be linked to the signature page or document in a manner that allows for later confirmation that the signatory signed the signature page or document. Finally, given that a signatory must execute an authentication document before or at the time an electronic filing is made, the signing process must include a timestamp that records the date and time of the electronic signature.

The new Rule 302(b)(2) provides that, before a signatory initially uses an electronic signature to sign an authentication document, the signatory must manually sign a document attesting that the signatory agrees that the use of an electronic signature in any authentication document constitutes the legal equivalent of such individual's manual signature. An electronic filer must retain this manually signed document for as long as the signatory uses an electronic signature to sign an authentication document and for a minimum period of seven years after the date of the most recent electronically signed authentication document.

Pursuant to Rule 302(b)(3), the electronic filer shall furnish a copy of any authentication document upon request to the SEC.

Additionally, a manually signed document under Rule 302(b)(1) or (b)(2) may be retained and stored by electronic means.

In connection with the amendments to Rule 302(b), the SEC amended certain rules and forms under the Securities Act, Exchange Act, and Investment Company Act to allow the use of electronic signatures in authentication documents in connection with other filings that contain typed, rather than manual, signatures. These amendments extend comparable treatment to these filers in allowing electronically signed authentication documents under generally the same conditions applicable to electronic filers under Rule 302(b).

Effective Upon Publication in Federal Register

The SEC found that the amendments do not substantially alter the rights and obligations of non-agency parties, which circumvents the requirement that an agency publish notice of a rulemaking in the Federal Register and provide an opportunity for public comment. Additionally, the SEC believes that a notice and comment period is unnecessary because the amendments provide an optional, alternative method for signatories to sign authentication documents pursuant to Rule 302(b).

As such, these amendments will be immediately effective upon their publication in the Federal Register.

For More Information

If you would like to discuss any topic covered in this Client Alert, please contact a member of the Investment Management group or visit us online at chapman.com.

- 1 For clarification, the rule amendment provides that certain terms will be defined in the EDGAR Filer Manual. The term "electronic signature" is defined as an electronic sound, symbol, or process, attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record. The term "credential" is defined as an object or data structure exclusively possessed and controlled by an individual to assert identity and provide for authentication.
- 2 The term "non-repudiation" is defined as assurance that an individual cannot falsely deny having performed a particular action.

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